Supreme Court, U.S.
FILED

961621 APR 9 1997

No. _____

OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1996

MARGEE DAIGLE KING,

*Petitioner,*

v.

CECIL FIELDER AND STACY FIELDER,

*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

ERIC A. LIEPINS*
SBN 12338110
ERIC A. LIEPINS, P.C.
2602 McKinney Ave., Suite 310
Dallas, Texas 75204
(214) 855-0308
(214) 855-0503 (fax)

CHARLES W. BLOUNT, III
SBN 02505900
DOWD & BLOUNT
2828 Woodside Street
Dallas, Texas 75204
(214) 922-9330
(214) 922-9372 (fax)

**Counsel of Record*

*Counsel for Petitioner*
*Margee Daigle King*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

30 pp

## QUESTION PRESENTED

Does the Fifth Circuit's failure to apply state "collateral estoppel law" to determine dischargeability of a debt under federal bankruptcy law directly conflict with decisions in the Second, Sixth, Seventh, Ninth and Eleventh Circuits and 28 U.S.C. § 1738?

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

STATUTES INVOLVED IN THE CASE ..... 2

STATEMENT OF THE CASE ..... 3

REASONS FOR GRANTING WRIT ..... 4

THE FIFTH CIRCUIT'S OPINION IS DIRECTLY CONTRARY TO THE DECISIONS OF THE SECOND CIRCUIT IN *TOWN OF DEERFIELD*, THE SIXTH CIRCUIT IN *BURSACK*, THE SEVENTH CIRCUIT IN *STUDIO ARTS THEATRE OF EVANSVILLE*, THE NINTH CIRCUIT IN *INTEL*, AND THE ELEVENTH CIRCUIT IN *AQUATHERM* AS WELL AS 28 U.S.C. § 1738 BY NOT APPLYING TEXAS COLLATERAL ESTOPPEL LAW TO DETERMINE THE PRECLUSIVE NATURE OF THE PRIOR STATE COURT JUDGMENT ..... 4

CONCLUSION ..... 8

APPENDIX ..... 1a

# TABLE OF AUTHORITIES

Page

CASES:

*Aquatherm Industries, Inc. v. FLA Power & Light Co.*, 84 F. 3d 1388 (11th Cir. 1996) ..... 5

*Barr v. Resolution Trust Corp.*, 837 S.W. 2d 627 (Tex. 1992) ..... 6

*Bonniwell v. Beech Aircraft Corp.*, 663 S.W. 2d 816 (Tex. 1984) ..... 6

*Town of Deerfield v. FCC*, 992 F. 2d 420 (2nd Cir. 1992) ..... 5

*In re Bursack*, 65 F. 3d 51 (6th Cir. 1995) ..... 6

*Intel Corp. v. Advanced Micro Devices, Inc.*, 12 F. 3d 908 (9th Cir. 1993) certiorari denied, 512 U.S. 1205, 114 S. Ct. 2675, 129 L. Ed. 2d 810 (1994) ..... 5

*Marrese v. American Academy of Othopaedic Surgeons*, 470 U.S. 373, 105 S. Ct. 1327, 84 L. Ed. 2d 274 (1985) ..... 6

*Matter of Davis*, 3 F. 3d 113 (5th Cir. 1993) ..... 7

*Northeast Indep. School Dist. v. Aldridge*, 400 S.W. 2d 893 (Tex. 1966) ..... 7

*Scherr v. Oyedokum*, 889 S.W. 2d 546 (Tex. Civ. App.- Houston [14th Dist] 1994, no writ) ..... 7

*Studio Art Theatre of Evansville, Inc. v. City of Evansville, Ind.*, 76 F. 3d 128 (7th Cir. 1996) rehearing and suggestion for rehearing denied ..... 5

STATUTES:

28 U.S.C. § 1254(1) ..... 2

28 U.S.C. § 1738 ..... 2, 4

RULES:

Supreme Court Rule 13.1 ..... 2

## PETITION FOR WRIT OF CERTIORARI

Margee Daigle King ("King") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 9, 1997, in order to resolve the conflict between the Fifth Circuit Court of Appeals and the Courts of Appeal for the Second, Sixth, Seventh, Ninth and Eleventh Circuits, on the important issue presented here.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition, as well as the opinion from the United States District Court for the Eastern District of Texas, the Memorandum Opinion of the United States Bankruptcy Court for the Eastern District of Texas, and the Judgment from the 192nd Judicial District Court in Dallas County, Texas, are reprinted in Appendix A hereto ("App. A") at page A-1 through A-18.

## JURISDICTION

On June 20, 1995 the United States Bankruptcy Court for the Eastern District of Texas, Sherman Division issued a Memorandum Opinion granting King's Motion to Dismiss Complaint to Determine Dischargeability filed by Cecil and Stacy Fielder ("Fielder"). Fielder timely filed a Notice of Appeal with the United States District Court for the Eastern District of Texas, Sherman Division.

On June 24, 1996 the United States District Court for the Eastern District of Texas, Sherman Division entered its Final Judgment and Order affirming the Bankruptcy Court's decision. Fielder timely appealed to the Fifth Circuit. On January 9, 1997, the Fifth Circuit reversed the judgment of the District Court. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the entry of the judgment of the Fifth Circuit.

The jurisdiction of the Court is involved pursuant to 28 U.S.C. § 1254(1).

## STATUTES INVOLVED IN THE CASE

28 U.S.C. § 1738, provides:

The Acts of the legislature of any State, Territory or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestence of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper forum.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage

in the courts of such State, Territory or Possession from which they are taken.

## STATEMENT OF THE CASE

King and Fielder were involved in litigation in the state district court in Dallas, Texas. After a two-week trial on the merits of the claims asserted by Fielder against King, the jury returned a verdict against King and in favor of Fielder, finding King had breached a contract with Fielder and had committed fraud against them. The State court rendered its verdict on the jury's findings providing Fielder with a judgment of actual and punitive damages ("Judgment"). Thereafter, King filed a Motion for New Trial. The state court judge then rendered a new judgment limiting the award to the Fielders to breach on contract damages only ("New Judgment"). The New Judgment also contained a so-called "Mother Hubbard Clause" stating, "ALL OTHER RELIEF NOT EXPRESSLY GRANTED IS DENIED".

Fielder did not appeal the New Judgment, and thirty days thereafter, it became a final judgment. King subsequently filed a petition for relief under Chapter 7 of the United States Bankruptcy Code. Fielder filed a Complaint to Determine Dischargeability ("Complaint") seeking to enforce their New Judgment against King. King filed a Motion to Dismiss the Complaint as being barred by res judicata or collateral estoppel. The Bankruptcy Court applying Texas collateral estoppel law agreed and dismissed the Complaint finding all elements of Texas collateral estoppel law present. The District Court affirmed.

The Fifth Circuit reversed, holding that:

> "In this Circuit, issue preclusion will prevent a bankruptcy court from determining dischargeability issues for itself only if 'the first court has made specific, subordinate, factual findings on the identical dischargeability issue in question . . . and the facts supporting the court's findings are discernable from the court's record'."

Appendix A, A-4.

## REASONS FOR GRANTING THE WRIT

**THE FIFTH CIRCUIT'S OPINION IS DIRECTLY CONTRARY TO THE DECISIONS OF THE SECOND CIRCUIT IN *TOWN OF DEERFIELD*, THE SIXTH CIRCUIT IN *BURSACK*, THE SEVENTH CIRCUIT IN *STUDIO ARTS THEATRE OF EVANSVILLE*, THE NINTH CIRCUIT IN *INTEL*, AND THE ELEVENTH CIRCUIT IN *AQUATHERM* AND THE FULL FAITH AND CREDIT CLAUSE OF 28 U.S.C. § 1738 BY NOT APPLYING TEXAS COLLATERAL ESTOPPEL LAW TO DETERMINE THE PRECLUSIVE NATURE OF THE PRIOR STATE COURT JUDGMENT.**

There are few issues so sensitive to Bankruptcy law as that of dischargeability. Equally, there are few issues as sensitive to federal practice as consistency of application. The actions of the Fifth Circuit in this case casts confusion and doubt as to the dischargeability of state court judgments, precludes full faith and credit of state courts judgments in bankruptcy courts, and attempts to create a new federal standard for determining collateral estoppel in dischargeability cases. The need for uniformity in the

application of law and federal statutes requires a review of this matter by this Court.

The decision below is in direct conflict with the decisions from a number of other circuits including the Second, Sixth, Seventh, Ninth and Eleventh. All these circuits, as set forth more fully below, have held the circuit court is required to apply the collateral estoppel law of the state rendering the first judgment. To the contrary, the Fifth Circuit now holds that one must look to a new federal standard that requires "specific, subordinate, factual findings" to be articulated before collateral estoppel can apply. However, under Texas collateral estoppel law, there is no requirement for the "specific subordinate factual findings" demanded by the Fifth Circuit.

In determining preclusion effects of a state court judgment in subsequent federal court action for res judicata purposes, a court must look to state preclusion law. *Aquatherm Industries, Inc. v. FLA Power & Light Co.*, 84 F. 3d 1388 (11th Cir. 1996). To accord full faith and credit to given state court judgment, the court must at least apply that state's principles of res judicata and collateral estoppel. *Town of Deerfield v. FCC*, 992 F. 2d 420, 429 (2nd Cir. 1992). In deciding whether to give preclusive effect to state court judgments, federal courts look to state law in the state where the original judgment was decided. *Studio Art Theatre of Evansville, Inc. v. City of Evansville, Ind.*, 76 F. 3d 128, 130 (7th Cir. 1996) rehearing and suggestion for rehearing denied. The federal courts full faith and credit statute requires that federal courts look to state law to determine the preclusive effect of an earlier state court judgment. *Intel Corp. v. Advanced Micro Devices, Inc.*,

12 F. 3d 908 (9th Cir. 1993) certiorari denied, 512 U.S. 1205, 114 S. Ct. 2675, 129 L. Ed. 2d 810 (1994). The Bankruptcy Court's exclusive jurisdiction over dischargeability issues does not alter this rule. *In re Bursack*, 65 F. 3d 51 (6th Cir. 1995). The Fifth Circuit's failure to apply Texas preclusion law in this case directly conflicts with the requirements of applying state law to bankruptcy issue preclusion questions. In fact, this Court has held that federal courts must "look to state preclusion law in determining the preclusive effects of a state court judgment". *Marrese v. American Academy of Othopaedic Surgeons*, 470 U.S. 373, 105 S. Ct. 1327, 84 L. Ed. 2d 274 (1985).

As set forth in the opinion of the Bankruptcy Court, Texas collateral estoppel law precludes relitigation if (i) the facts sought to be litigated in the second action were fully and fairly litigated in the prior action (ii) those facts were essential to the judgment in the first action; and (iii) the parties were cast as adversaries in the first action. *Bonniwell v. Beech Aircraft Corp.*, 663 S.W. 2d 816, 818 (Tex. 1984). There is no requirement for "specific, subordinate, factual findings" in the prior action as required by the Fifth Circuit. The Fifth Circuit opinion does not cite to any Texas state court authority for such a requirement because none exists.

The Bankruptcy Court, in deciding to apply collateral estoppel, correctly analyzed Texas law in determining the "transactional approach" was the proper standard to be applied. *Barr v. Resolution Trust Corp.*, 837 S.W. 2d 627, 631 (Tex. 1992). App A, A-14. The Bankruptcy Court examined the state court original petition and the jury's verdict in determining that the fraud issue involved in the

New Judgment "arises from the same nucleus of operative facts that were tried in the first proceeding". App. A, A-14. The Bankruptcy Court's review of the state court petition, the jury verdict, the Judgment and the New Judgment is sufficient under Texas law to apply collateral estoppel without the need for the Fifth Circuit's requirement of "specific, subordinate, factual findings" that the debt was not obtained by fraud. *See Matter of Davis*, 3 F. 3d 113, 115 (5th Cir. 1993) (holding a judgment creditor's introduction of the state court opinion and jury questions was sufficient to determine whether the debtor was precluded from contesting nondischargeability of debts). In *Davis* there was no "specific, subordinate, factual finding" of fraud, however the Bankruptcy Court applied Texas collateral estoppel law to prevent relitigation of the issue in the bankruptcy court, and the Fifth Circuit affirmed that decision.

Additionally, had the Fifth Circuit properly applied Texas collateral estoppel law, the "Mother Hubbard Clause" contained in the New Judgment would have given the New Judgment preclusive effect, even without a "specific, subordinate factual finding". A judgment may expressly dispose of all issues and parties, even when a party or issue is not discussed in body of order, by including a statement that all relief not expressly granted is denied. *Scherr v. Oyedokum*, 889 S.W. 2d 546, 549 (Tex. Civ. App.- Houston [14th Dist] 1994, no writ); citing *Northeast Indep. School Dist. v. Aldridge*, 400 S.W. 2d 893 (Tex. 1966). Had the Fifth Circuit given full faith and credit to the state court judgment as required by 28 U.S.C. § 1738, the inclusion of the "Mother Hubbard Clause"

would give preclusive effect to the New Judgment in the bankruptcy court.

The Fifth Circuit's refusal to give full faith and credit to New Judgment and the Fifth Circuit's failure to apply Texas state collateral estoppel law are in direct and irreconcilable conflict with the decisions of the Second, Sixth, Seventh, Ninth and Eleventh Circuits. Certiorari is appropriate.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

ERIC A. LIEPINS*
SBN 12338110
ERIC A. LIEPINS, P.C.
2602 McKinney Ave, Suite 310
Dallas, Texas 75204
(214) 855-0308
(214) 855-0503 (fax)

CHARLES W. BLOUNT, III
SBN 02505900
Dowd & Blount
2828 Woodside Street
Dallas, Texas 75204
(214) 922-9330
(214) 922-9372 (fax)

**Counsel of Record*

*Counsel for Petitioner*
*Margee Daigle King*

**In the Matter of Margee Daigle KING, Debtor.**

**Cecil FIELDER and Stacey Fielder, Appellants,**

**v.**

**Margee Daigle KING, Appellee.**

**No. 96-40754**
**Summary Calendar.**

United States Court of Appeals,
Fifth Circuit.

Jan. 9, 1997.

Judgment creditors sought determination that judgment debt was nondischargeable under the fraud discharge exception. The bankruptcy court dismissed judgment creditors' complaint against Chapter 7 debtor, finding that res judicata barred their claim. Judgment creditors appealed. The United States District Court for the Eastern District of Texas, Joe J. Fisher, J., affirmed, and judgment creditors appealed. The Court of Appeals, Benavides, Circuit Judge, held that: (1) res judicata, or claim preclusion, was inapplicable in nondischargeability proceedings, and (2) state court record did not contain specific, subordinate factual finding that debt was not obtained by false pretenses, false representation, or actual fraud, and thus issue preclusion did not bar judgment creditors' complaint.

Reversed and remanded.

---

Appeal from the United States District Court for the Eastern District of Texas.

Before HIGGINBOTHAM, WIENER and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:

This appeal involves a bankruptcy court's application of res judicata (claim preclusion) to dismiss a creditor's nondischargeability complaint under Section 523(a)(2)(A) of the Bankruptcy Code. 11 U.S.C. § 523(a)(2)(A). Section 523(a)(2)(A) permits creditors to challenge the dischargeability in bankruptcy of "any debt . . . for money . . . to the extent obtained by . . . false pretenses, a false representation, or actual fraud. . . . " *Id.*

I.

Cecil and Stacey Fielder ("the Fielders") seek to prevent Margee Daigle King ("King") from discharging a Texas state court judgment rendered against King in November of 1994. A jury returned a verdict in favor of the Fielders, finding that King had breached a contract with the Fielders and had committed fraud against them. The jury's verdict included actual damages ($270,530.67) and punitive damages ($1.5 million). Initially, the state court rendered judgment on the jury's verdict. Then, in response to a motion for new trial filed by King, the trial court substituted a new judgment that limited the Fielders' award to contract damages ($128,849.49) along with pre-judgment and postjudgment interest. The state-court judgment does not reflect the reason that the court eliminated the Fielders' fraud damages.

One month after final judgment was rendered in favor of the Fielders, King filed for bankruptcy under Chapter 7 of the Bankruptcy Code. The Fielders brought an adversary proceeding against King in bankruptcy court, asserting that King's debt to them was non-dischargeable under Section 523(a)(2)(A) of the Bankruptcy Code. The bankruptcy court dismissed the Fielders' complaint, holding that the Fielders' non-dischargeability claim was barred by principles of res judicata. The district court affirmed the dismissal.

II.

The bankruptcy court's claim preclusion analysis is sound, and if claim preclusion was applicable in non-dischargeability proceedings, the Fielders' non-dischargeability complaint would be barred. The United States Supreme Court in *Brown v. Felsen*, however, held that the doctrine of res judicata does not apply in bankruptcy nondischargeability proceedings. 442 U.S. 127, 133-39, 99 S.Ct. 2205, 2211-13, 60 L.Ed.2d 767 (1979); *Key v. Wise*, 629 F.2d 1049, 1063-64 (5th Cir.1980) (discussing *Brown v. Felsen*). Consequently, we cannot affirm based on the reasoning of the bankruptcy court.

Collateral estoppel (issue preclusion), however, provides a possible alternative basis upon which to uphold the district court's affirmance. In *Grogan v. Garner*, the Supreme Court held that issue preclusion, unlike claim preclusion, applies to bankruptcy nondischargeability proceedings. 498 U.S. 279, 284 n. 11, 111 S.Ct. 654, 658 n. 11, 112 L.Ed.2d 755 (1991); *see Brown*, 442 U.S. at 139 n. 10, 99 S.Ct. at 2213 n. 10. In this circuit, issue

preclusion will prevent a bankruptcy court from determining dischargeability issues for itself only if "the first court has made specific, subordinate, factual findings on the identical dischargeability issue in question . . . and the facts supporting the court's findings are discernible from that court's record." *In re Dennis*, 25 F.3d 274, 278 (5th Cir.1994) (citations omitted), *cert. denied*, ___ U.S. ___, 115 S.Ct. 732, 130 L.Ed.2d 636 (1995).

The state-court record presented for our review does not meet the requirements set out in *Dennis*. The record reflects no "specific, subordinate, factual finding" that King's debt to the Fielders was not obtained by false pretenses, false representations, or actual fraud. Moreover, the record is devoid of facts to support such a finding, even had such a finding been made.[1] The party asserting issue preclusion bears the burden of proof, *Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 801-02 (Tex.1994),[2] and hence would have the burden of bringing forward an adequate state-court record.

---

[1] A full state-court record will not always or even often be required for the bankruptcy court to apply issue preclusion. *See In re Davis*, 3 F.3d 113, 114-15 (5th Cir.1993). The record must, however, provide a sufficient basis upon which the bankruptcy court may determine that the issue to be decided was actually litigated and necessarily decided in state court. *See In re Allman*, 735 F.2d 863, 865 (5th Cir.) (citations omitted), *cert. denied*, 469 U.S. 1086, 105 S.Ct. 590, 83 L.Ed.2d 700 (1984).

[2] Because King asked the bankruptcy court to give conclusive effect to a Texas state court judgment, Texas rules of preclusion apply. *In re Garner*, 56 F.3d 677, 679 (5th Cir.1995). Under Texas law, a party asserting issue preclusion must establish that (1) the facts sought to be litigated in the second action were fully and fairly litigated in the prior action; (2) those facts were essential to the judgment in the first action; and (3)

King essentially argues that the substituted state-court judgment, which awarded contract damages and denied "all relief not expressly granted," constitutes a specific finding that King did not obtain the debt by false pretenses, false representation, or actual fraud. We disagree. The bare fact that the state court awarded only contract rather than fraud damages does not preclude the bankruptcy court from inquiring into the true nature of that debt. The bankruptcy court is not bound by the "breach of contract" label that the state-court assigned to the judgment awarded to the Fielders. *See Dennis*, 25 F.3d at 277.[3] We have admonished bankruptcy courts to "look beyond the labels which state courts . . . give obligations which debtors seek to have discharged." *Id.* (citations and footnote with additional citations omitted). The fact that a state court labels a judgment "contract damages" rather than "fraud damages" does not control the bankruptcy court if the state court's determination did not necessarily include a finding regarding the dischargeability issue (*i.e.*, whether the debt was obtained by false pretenses, a false representation, or actual fraud).

The bankruptcy court itself stated that the determination that the Fielders' claim sounded in contract rather than fraud was made for reasons "only known to the state court judge." Under these circumstances, the state

---

the parties were cast as adversaries in the first action. *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex.1984), *quoted in Garner*, 56 F.3d at 680.

[3] The Fielders need not have recovered a state-law fraud verdict in order to prevail on a claim that the debt owed them was obtained by fraudulent behavior and consequently should not be discharged. See *Brown*, 442 U.S. at 138-39, 99 S.Ct. at 2213.

court's elimination of fraud damages can hardly be construed as a specific factual finding regarding the federal law dischargeability issue. As the Fielders suggest, the state court may have disallowed fraud damages, not because it disagreed with the jury's fraud finding, but rather because under Texas law, "[w]hen the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone." *Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 495 (Tex.1991) (quoting *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex.1986)). Under *Jim Walter Homes* and *DeLanney*, the nature of a plaintiff's injury can preclude the plaintiff from recovering under a fraud theory, even if the defendant's conduct was fraudulent. Consequently, if the state court eliminated the Fielders' fraud damages based on the rule of *Jim Walter Homes* and *DeLanney*, that action would not constitute a finding, express or implied, that King's debt for money was not obtained by false pretenses, a false representation, or actual fraud within the meaning of Section 523(a)(2)(A).

III.

In sum, the state-court record does not contain a specific, subordinate factual finding that King's debt was *not* obtained by false pretenses, a false representation, or actual fraud nor does it contain any facts that would support such a finding. On this record, issue preclusion does not bar the Fielders' nondischargeability complaint. Accordingly, the judgment of the district court is REVERSED and the case is REMANDED with directions to remand to the bankruptcy court for further proceedings.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF TEXAS**
**SHERMAN DIVISION**

| | | |
|---|---|---|
| **IN RE:** | § | |
| **MARGEE DAIGLE KING A/K/A MARGEE MOODY, Debtor** | § | **CASE NO. 94-42298-A CHAPTER 13** |
| | § | |
| **CECIL FIELDER AND STACY FIELDER Appellants** | § | **CIVIL ACTION NO. 4:95CV218** |
| **VS.** | § | |
| **MARGEE DAIGLE KING A/K/A MARGEE MOODY Appellee.** | § | |

## FINAL JUDGMENT AND ORDER

(Filed June 24, 1996)

**Before the Court** for consideration is the appeal from the Bankruptcy Court in the above-entitled Chapter 13 bankruptcy proceeding, of the Bankruptcy Court's Order granting the Debtor's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The Court, having reviewed the briefs of the parties and the bankruptcy court's well reasoned Memorandum Opinion and Order, is of the opinion that the Bankruptcy Court's Order is correct and that it should be Affirmed.

**Therefore, it is** hereby **ORDERED and ADJUDGED** that the Order of the Bankruptcy Court dismissing the above-entitled Adversary Proceeding should be and hereby is in all respects **AFFIRMED.**

SIGNED this 24th day of June, 1996.

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE EASTERN DISTRICT OF TEXAS**
**SHERMAN DIVISION**

| | | |
|---|---|---|
| IN RE: | § | |
| MARGEE D. KING, | § | CASE NO. 94-42298 |
| DEBTOR. | § | CHAPTER 7 |
| CECIL FIELDER and STACEY FIELDER, PLAINTIFFS, | § | ADVERSARY NO. 95-4058 |
| v. | § | |
| MARGEE D. KING, DEFENDANT. | § | |

## MEMORANDUM OPINION

(Filed June 23, 1995)

Before the Court is a Motion To Dismiss Complaint ("Motion") filed by the Defendant on May 5, 1995. After reviewing the Motion, the state court record, the response filed by the Plaintiffs, and the relevant law, the Court is of the opinion that the Motion should be granted.

## BACKGROUND

The pertinent facts are not seriously disputed. In August 1990, the Plaintiffs hired the Defendant to decorate and furnish a home the Plaintiffs were building and landscape the yard. After problems arose, the Plaintiffs in March 1991 sued the Defendant and her husband in state court alleging breach of contract, breach of fiduciary duties, negligence and professional negligence, fraud and intentional misrepresentation, and accounting. During

the pendency of the state court action, the Defendant filed for relief under Chapter 7 of Title 11 on March 1, 1993.[1] During that bankruptcy, the Plaintiffs filed an adversary proceeding similar to the instant proceeding.[2] For a reasons [sic] not clearly stated to the Court, the Defendant filed a motion to vacate the discharge order that had been entered[3] and a motion to dismiss the bankruptcy. On January 18, 1994, an order was entered granting both motions filed by the Defendant. Also on January 18th, an order was entered dismissing the pending adversary proceeding.

Following the dismissal of the prior bankruptcy, the state court proceeding continued. After a two week trial in August 1994, the jury found the Defendant liable for breach of contract, negligence, and actual fraud. Based on the verdict of the jury, the state court in September 1994 entered a Final Judgment that awarded the Plaintiffs $270,530.67 in actual damages, plus prejudgment interest, and $1,500,000.00 in punitive damages. However, in November 1994, the state court granted the Defendant's motion for new trial and vacated the prior judgment and substituted a new judgment. The state court judge apparently accepted the Defendant's argument that the Plaintiffs were only entitled under Texas law to recovery under the breach of contract claim and not any of the tort claims. Accordingly, a new judgment was entered limiting the damages to that awarded by the jury that soley [sic] corresponded to the breach of contract cause of

---

[1] Case No. 93-40266.

[2] Adversary No. 93-4087.

[3] The discharge order was entered on July 26, 1993.

action – $128,849.42, plus prejudgment interest. The new judgment was never appealed and is now final.

Shortly after the entry of the new judgment, the Defendant filed for relief a second time under Chapter 7 on December 29, 1994. On April 17, 1995, the Plaintiffs filed this adversary proceeding alleging that their claim should be declared nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) because of the fraudulent acts of the Defendant.[4] In the Motion, the Defendant asserts that because the discharge order in the first bankruptcy was improperly vacated, the Plaintiffs's claim was discharged in the prior bankruptcy when the first adversary proceeding was dismissed. Alternatively, the Defendant asserts in the Motion that because the state court based liability soley [sic] on breach of contract and not on any tort theory pled, the Plaintiffs are barred by the doctrine of res judicata from litigating a fraud claim in this Court.

## ANALYSIS

A. Prior Bankruptcy

Pursuant to 11 U.S.C. § 727(e), a "trustee, or a creditor, or the United States trustee may request a revocation of a discharge". Any request to revoke a discharge must be brought as an adversary proceeding. *Fed. R. Bankr. Proc.* 7001(4). The Defendant asserts that because § 727(e)

---

[4] Section 523(a)(2) declares nondischargeable, in relevant part, debts "for money, property, services, . . . to the extent obtained by –

(A) false pretenses, a false representation, or actual fraud".

does not authorize a "debtor" to request that a discharge be revoked and because the request was not made through an adversary proceeding, the order vacating the Defendant's discharge in the first bankruptcy is void. Accordingly, the Defendant argues that the Plaintiffs' claim was discharged in the first bankruptcy after the Court entered an order dismissing the adversary proceeding filed in the prior bankruptcy.

Whether the Court erred in granting the Defendant's motion to vacate her own discharge is a matter the Court need not decide. If the Court did err in granting the motion, the proper procedure would have been for the Defendant to either request in the prior bankruptcy that the Court reconsider the order or appeal the order. *See Celotex Corp. v. Edwards,* 115 S.Ct. 1493, 1501 (1995) (improper orders are to be respected until reversed by the court issuing the order or by a higher court); *Federated Dept. Stores, Inc. v. Moitie,* 452 U.S. 394, 398 (1981) (a voidable judgment based upon an erroneous view of the law is not open to collateral attack). To attack the validity of the order in this bankruptcy is merely an improper collateral attack of the order. Because the order granting the Defendant's motion to vacate discharge was never properly challenged, it has become final and the discharge vacated. Accordingly, the Plaintiffs' claim was not discharged in the first bankruptcy.

B. Res Judicata

Res judicata prevents a party from re-litigating issues that were, or could have been, raised in a prior action. *In re Matlock,* 149 B.R. 425, 427 (Bankr. E.D. Tex. 1992). The

determination of the res judicata effect of a prior state court judgment must be based upon the preclusion law of the state from which the judgment was taken. *Marrese v. Am. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). In the instant proceeding, the Court will look to Texas law which holds that res judicata is applicable if:

1) the parties are identical in the two actions;
2) the prior judgment was rendered by a court of competent jurisdiction;
3) there was a final judgment; and
4) the same cause of action is involved in both cases.

*Eubanks v. F.D.I.C.*, 977 F.2d 166, 169 (5th Cir. 1992). Based on a review of the pleadings and arguments of the parties, it appears that only the fourth requirement is in serious dispute.

In determining whether the same cause of action is involved, the Court must apply the "transactional approach". *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 631 (Tex. 1992).[5] That is, if the cause of action before the Court arises out of the same subject matter and which might have been litigated in state court, res judicata bars this proceeding. *Barr*, 837 S.W.2d at 630. This requires the Court to examine the factual basis of the claim(s) in the

---

[5] The Plaintiffs' reliance on *In re Daley*, 776 F.2d 834 (9th Cir. 1985), is misplaced. Because the 9th Circuit stated that res judicata did not apply in that case because there was "no incentive" to prosecute the tort claim, it appears that the transactional approach was not applied. The transactional approach requires that all claims arising from the same facts be litigated. *Barr*, 837 S.W.2d at 630.

prior state court action *without regard to the form of the action. Barr,* 837 S.W.2d at 630. The analysis includes "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a trial until conforms to the parties; expectations or business understanding or usage." *Barr* 837 S.W.2d at 631. The Court must look to the factual predicate of the claims asserted and not the legal theories upon which the Plaintiffs rely. *Eubanks,* 977 F.2d at 171. "A mere change in legal theory does not create a new cause of action for res judicata." *Eubanks,* 977 F.2d at 171 (citing *Alexander v. Chicago Park Dist.,* 773 F.2d 850, 854 (7th Cir.), *cert. denied,* 475 U.S. 1095 (1985)).

The Plaintiffs assert that the issue of whether the debt was incurred by fraud was not reached by the state court and that the issue was not necessary or relevant for the state court judgment. Thus, res judicata is not applicable to this proceeding. However, whether a particular issue is necessary or relevant in a prior proceeding is not the standard under res judicata. Instead, the Court must determine whether the issue arises from the same nucleus of operative facts that were tried in the first proceeding. Based on the state court original petition and judgment rendered, it is clearly evident that the issue of fraud was actually tried in state court and the same facts which supported the jury's verdict that a contract was breached also supported the jury's verdict that fraud occurred. The same factual predicate supports both a claim for breach of contract and fraud.

The Plaintiffs' attempt in this proceeding to once again convert their claim against the Defendant to a tort claim rather than just a contract claim in order to have the

claim declared nondischargeable under § 523(a)(2)(A) is not proper. Such mere changes in legal theory will not avoid the preclusive effect of res judicata. Because the Court must look to Texas law when applying res judicata, if Texas does not allow such a substitution of legal theories, neither can this Court. "[M]atters once tried shall be considered forever settled as between the parties." *Moitie*, 452 U.S. at 401 (quoting *Baldwin v. Traveling Men's Assn.*, 283 U.S. 522, 525 (1931)). Accordingly, because the state court disallowed the Plaintiffs' tort theories and based the judgment soley [sic] on a finding of breach of contract, res judicata bars the Plaintiffs from re-litigating the fraud issue in this Court.

Additionally, barring the Plaintiffs from rearguing their fraud allegation, however, does not equate to a holding that party could never have a debt that is associated with a contract declared nondischargeable under § 523(a)(2)(A). Texas clearly recognizes that under certain situations, a tort claim may exist simultaneously with a breach of contract claim. *See Southwestern Bell Telephone Co. v. DeLanney*, 809 S.W.2d 493, 495 (Tex. 1991) (citing *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986). For reasons only known to the state court judge,[6] a determination was made that the Plaintiffs' claims sounded purely in contract and thus all damages arising from the tort claims, including fraud, were disallowed. If the Plaintiffs believed that they were also entitled to recover damages based on fraudulent acts of the Defendant, the Plaintiffs were required to either have the trial court

---

[6] The state court judge did not explain the rational [sic] for limiting damages solely to the breach of contract claim.

reconsider its judgment or appeal the judgment. Neither request was made and res judicata applies to judgments that may be improper.

## CONCLUSION

For the reasons stated herein, the Court is of the opinion that the doctrine of res judicata bars the Plaintiffs from proceeding with this adversary proceeding. The Plaintiffs failed to assert a claim upon which the Court can grant relief. Therefore, the Court will entered [sic] an order concurrently with the entry of the Memorandum Opinion dismissing this adversary proceeding pursuant to Federal Rule of Civil Procedure 12(b)(6).

Signed this 20th day of June, 1995.

/s/ Houston Abel
HOUSTON ABEL, CHIEF JUDGE
UNITED STATES
BANKRUPTCY COURT
EASTERN DISTRICT OF TEXAS

No. 91-03603-M

| | | |
|---|---|---|
| CECIL FIELDER and STACEY FIELDER, | § | IN THE DISTRICT COURT |
| Plaintiffs, | § | OF DALLAS COUNTY, TEXAS |
| v. | § | |
| MARGEE MOODY, | § | 298th JUDICIAL DISTRICT |
| Defendant. | § | |

*ORDER*

On November 18, 1994, the Court heard Defendant Margee King's (formerly Margee Moody, herein "King") Motion for New Trial (the "Motion"). Finding that certain of the arguments in the Motion are well-founded, the Court is of the opinion that it should be granted in part, and that the judgment dated September 13, 1994 should be vacated. It is therefore,

**ORDERED** that the judgment dated September 13, 1994 is vacated. Substituted in its place is the following: Because it appears to the Court that the verdict of the jury was for the Plaintiffs and against the Defendant, judgment is hereby rendered on the verdict in favor of the Plaintiffs and against the Defendant. It is further

**ORDERED** that Cecil Fielder and Stacey Fielder have and recover actual damages from King in the sum of $128,849.42 for King's breach of contract, plus pre-judgment interest. It is further

**ORDERED** that the judgment here rendered shall bear interest at the rate of ten percent (10%) from September 13, 1994, until paid. It is further

**ORDERED** that all costs of court expended or incurred in this case are adjudged against King. All writs and processes for the enforcement and collection of this judgment or the costs or court may issue as necessary.

ALL OTHER RELIEF NOT EXPRESSLY GRANTED IS DENIED.

SIGNED this 28th day of November, 1994.

/s/ Illegible
Presiding Judge